

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Orig w/ Affidavit of mailing

75-2149

To be argued by
LEE A. ADLERSTEIN

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-2149

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT SAMPOGNE and STEVEN MALTESE,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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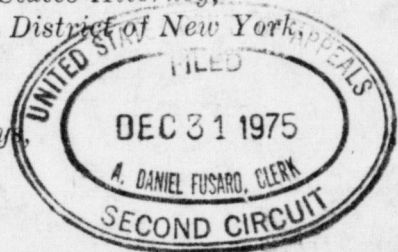




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ROBERT SAMPOGNE and STEVEN MALTESE,

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BRIEF FOR THE APPELLEE

Preliminary Statement

Robert Sampogne and Steven Maltese appeal from judgments of the United States District Court for the Eastern District of New York (Judd, J.) entered November 18, 1975, following an evidentiary hearing held the same date, adjudging both appellants to be in contempt of court for failure properly to respond to Government trial subpoenas; Rule 17(g), Federal Rules of Criminal Procedure. Appellant Sampogne was sentenced to imprisonment for 40 days and a \$750 fine. Appellant Maltese was sentenced to imprisonment for 90 days and a \$1,000 fine. Both appellants commenced serving their prison sentences immediately after the November 18, 1975 hearing, but were subsequently released on bail pending appeal on November 26, 1975. On November 21, 1975 the fines imposed against both appellants were paid in full.

On this appeal, both appellants contend that there was insufficient evidence for the district judge properly to find each appellant guilty of wilful contempt of court. Additionally, appellants argue that if the contempt findings of the district judge were proper, payment in full of the fines completely satisfied the sentences imposed and hence appellants need not serve any additional time in jail.

Statement of the Case

A. Introduction and Summary.

From October 15, 1975 through October 22, 1975 a criminal trial was held in the case of *United States v. Lawrence John Alfano* (75 Cr. 298) before United States District Judge Orin G. Judd. Mr. Alfano was charged, and found guilty on the latter date, for theft of commercial airline passenger tickets having a value in excess of \$100, in violation of Title 18, United States Code, Section 659.¹

On October 10, 1975 separate trial subpoenas, bearing the signature of the Clerk of the United States District Court for the Eastern District of New York, were issued by the United States Attorney's Office and were directed to each of the appellants. The subpoenas commanded the appellants to appear at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, at 2 P.M. on October 15, 1975. The Government's case agent, Special Agent Michael R. Rigolizzo, FBI, executed a return on the subpoena for

¹ Mr. Alfano has been sentenced to imprisonment for two years and a \$1,000 fine. Execution of this sentence has been stayed pending Mr. Alfano's appeal. Court of Appeals Docket Number T-5475.

Mr. Maltese, stating that a copy of the subpoena had been served on the wife of Mr. Maltese at the Maltese home on October 11, 1975 after Mr. Maltese had been reached by the agent on the telephone and had consented to the serving of the subpoena in such a manner.² Appellant Sampogne was personally served on October 12, 1975.

The Government had, as Judge Judd found in his memorandum opinion (at p. 2) filed on November 19, 1975 and as appellants do not contest, ample reason to call the appellants as witnesses:

The witnesses were not casual witnesses subpoenaed without knowledge of why their testimony was desired by the government. As the court knew from the trial of the indictment against Lawrence Alfano for knowing possession of stolen airline tickets, and as both witnesses undoubtedly knew as well, Mr. Sampogne was an owner of the Cross Roads Bar, of which Mr. Alfano was the manager and, according to Mr. Alfano's grand jury testimony, Mr. Sampogne leased the Cadillac which Mr. Alfano drove. Mr. Maltese was a close friend of Mr. Alfano and, according to Mr. Alfano's grand jury testimony, he had obtained airline tickets for Mr. Maltese through his "source."

Mr. Maltese never appeared in the courthouse as directed on October 15, 1975 nor at any other time during the trial. Mr. Sampogne did appear in the courthouse on October 15, 1975. However, although he was not called

² These facts were stipulated to by counsel for Mr. Maltese at the hearing held on November 18, 1975 (32). (Page references in parenthesis refer to pages of the November 18 transcript.)

as a witness on October 15, and despite efforts on behalf of the Government to reach him, Mr. Sampogne did not return to the courthouse at any other time during the trial. The Government was thus unable to present the testimony of either appellant.

On October 17, 1975, Judge Judd ordered bench warrants to issue designating both appellants as material witnesses.³ On October 30, 1975, well after the conclusion of the Alfano trial, both appellants surrendered to the United States Marshal and were released on bail the same date. An evidentiary hearing was conducted before Judge Judd on November 18, 1975 where the Government presented evidence to show that each appellant had willfully failed to respond to duly served trial subpoenas. Each appellant presented evidence to support the argument that failure to respond to the subpoenas had not been willful.

³ On October 17, 1975 an affidavit was filed with the Court by Myles C. Cunningham, the Assistant United States Attorney who had handled the Alfano trial, to support the Government's request for an arrest warrant for Mr. Maltese. Mr. Cunningham stated that at 5 P.M. on October 15, 1975 he received a telephone call from the wife of Mr. Maltese and was told that Mr. Maltese was receiving treatment for a heart attack that very day from a Dr. Mangiaracina at Long Island Medical College Hospital. Mr. Cunningham confirmed this information by telephone with Dr. Mangiaracina and suggested that Mr. Maltese undergo an independent examination on October 17, 1975 at Samaritan Hospital in Brooklyn. Dr. Mangiaracina agreed and later told Mr. Cunningham that he instructed Mr. Maltese to report to Samaritan Hospital on October 17.

The affidavit further stated that the wife of Mr. Maltese had told Dr. Mangiaracina that Mr. Maltese had left home on the evening of October 16 and that the whereabouts of Mr. Maltese on October 17 were unknown. A telephone call from Mr. Cunningham to a Dr. Pelech at Samaritan Hospital confirmed that Mr. Maltese had not visited that hospital.

B. The Hearing on Mr. Maltese.

At the November 18, 1975 hearing, Mr. Cunningham repeated the statements in his affidavit (*supra*, p. 4 n. 3) and added the following information: Mr. Maltese had been at the Long Island Medical College Hospital on October 15, but was treated only as an out-patient (15). Two physicians at that hospital had rejected Dr. Mangiaracina's view that Mr. Maltese needed to be admitted (16). Dr. Mangiaracina and Mr. Maltese are first cousins (16). Mrs. Maltese had called Mr. Cunningham on October 17 and told him that Mr. Maltese had left home on the evening of October 16 and that the whereabouts of Mr. Maltese were unknown (18). Further attempts to reach Mr. Maltese were fruitless; Mr. Maltese never called Mr. Cunningham to explain the failure to appear (18-19).

Dr. Mangiaracina testified that Mr. Maltese had first contacted him complaining of discomfort on October 10, 1975 but was not examined until October 11. A cardiogram taken of Mr. Maltese on October 14 was "essentially within normal limits" (36-38). Testimony of Dr. Mangiaracina relating to the events of October 15 through October 17 corresponded to the testimony of Mr. Cunningham (39-45). Dr. Mangiaracina confirmed that Mrs. Maltese had told him that Mr. Maltese had left home on the night of October 16 (44, 50). Dr. Mangiaracina added that Mrs. Maltese later stated she had lied about her husband leaving home on October 16 (45).

During cross-examination Dr. Mangiaracina stated that he was a first cousin of Mr. Maltese (46), and added that Mr. Maltese had told him that the service of a subpoena had added to the physical discomfort Mr. Maltese was undergoing (54).

Mrs. Eileen Maltese testified that her husband had not left home on October 16 or October 17; her statement to Mr. Cunningham to the contrary had been untrue (60-61). Concern for her husband's health had caused her to lie (65). Lastly, Mary Jo Maltese, appellant's 17 year old daughter, testified that she had seen her father at home shortly before she retired on the night of October 16 and shortly after she awakened on the morning of October 17 (68-69).

C. The Hearing on Mr. Sampogne.

Mr. Cunningham testified at the November 18 hearing that he had seen Mr. Sampogne in the Courthouse at about 2 P.M. on October 15. At the end of court proceedings on that day Mr. Cunningham looked without success for Mr. Sampogne near the courtroom (6-7). The following morning Mr. Cunningham told agent Rigolizzo to locate Mr. Sampogne and instruct him to return to the courthouse (8).

Agent Rigolizzo testified that he saw Mr. Sampogne outside Judge Judd's courtroom "sometime during the afternoon" of October 15 (33). On the afternoon of October 16, pursuant to Mr. Cunningham's instructions, agent Rigolizzo called the Sampogne residence. He spoke to Mrs. Sampogne, who stated that she did not know her husband's whereabouts, and advised her that Mr. Sampogne was required at the Courthouse on October 17 "for the same purpose that he was . . . [subpoenaed for] . . . October 15th." Mrs. Sampogne stated that "she would get the message to him" (74). On cross-examination, agent Rigolizzo stated that the Mrs. Sampogne with whom he spoke on the phone was the same person on whom he had served the subpoena on October 12, though he could not make a voice identification with certainty (77-78).

D. The Court's Findings.

After hearing the evidence on November 18, 1975, Judge Judd made the following findings:

With respect to Mr. Sampogne, he admittedly received the subpoena, admittedly reported to court, immediately left the courtroom without getting permission from anyone. . . . Unless he wanted to run out on the trial, he would have asked either Mr. Cunningham or the Court whether he had to come back. He had been here and he heard part of the trial. I think he was taking a deliberate way of avoiding performing his public duty in testifying, so I find that he has violated Rule 17(g) of the Federal Rules of [Criminal] Procedure, by failing without adequate excuse, to obey a subpoena that was served upon him.

With respect to Mr. Maltese, it is clear that he authorized the acceptance of a subpoena around the time that he received the subpoena. Instead of calling an outside doctor, if he was really sick, he called a member of the family who would not ordinarily treat a first cousin. The symptoms that he gave to Dr. Mangiaracina were almost all subjective symptoms, which would lead a doctor to be a little afraid to tell him that it is nothing at all, just go around as if nothing happened. But it is significant that the two doctors who were present at Long Island College Hospital when Mr. Maltese was taken there, disagreed with Dr. Mangiaracina's recommendation, that he be kept overnight, and clearly Mr. Maltese refused to cooperate with the court in obtaining a physical examination. He has put his family through an unnecessary, degrading and shameful ordeal, that he should have known better than to try and ask them to support his fraud.

Mrs. Maltese clearly faked her statement to Mr. Cunningham that she didn't know where her husband was, and I did not believe her statement that she was acting without his knowledge and direction in denying his presence in the house.

I find that he too is guilty of a willful failure to obey a subpoena without adequate excuse. (79-81).

Judge Judd, in his memorandum opinion of November 19, 1975 (p. 2), made it clear that in his view "the absence of the [appellants as] witnesses jeopardized the Government's case in the prosecution of the Alfano indictment."

ARGUMENT

POINT I

There was ample evidence to support Judge Judd's findings and contempt orders.

Rule 17(g) of the Federal Rules of Criminal Procedure provides:

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued . . .

During the course of the proceedings in the district court, neither appellant contested having been properly served with a subpoena. Further, the Government submits that the record fully supports Judge Judd's findings that the illness of Mr. Maltese had been feigned to avoid obeying the subpoena and that Mr. Sampogne's failure to contact the Government subsequent to October 15 showed that he was willfully evading the subpoena served on him. Beyond

a reasonable doubt there was failure by both defendants to show an "adequate excuse" to obey the subpoenas. *Nilva v. United States*, 352 U.S. 385, 395 (1957); *In re Williams*, 509 F.2d 949, 960 (2d Cir. 1975). Nor does Mr. Sampogne contest his obligation to have been available to testify subsequent to October 15. *Blackmer v. United States*, 284 U.S. 421, 443 (1931); *United States v. Snyder*, 413 F.2d 288, 289 (9th Cir.), *cert. denied*, 396 U.S. 907 (1969); *In re Germann*, 262 F. Supp. 707, 710 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 1019 (1967).

POINT II

The sentences should be upheld in their entirety.

It is clear that appellants were found to be in criminal contempt, *In re Osborne*, 344 F.2d 611 (9th Cir. 1965); *United States v. De Simone*, 267 F.2d 741 (2d Cir.), *vacated as moot*, 361 U.S. 125 (1959); 8 Moore's Federal Practice. ¶ 17.10, which is punishable pursuant to Title 18, United States Code, Section 401 by fine or imprisonment. Appellants cite *In re Bradley*, 318 U.S. 50 (1943), for the proposition that where a district court has imposed a fine and imprisonment pursuant to Section 401 and the person sentenced has paid the fine, even after commencing the jail sentence, such payment completely satisfies the judgment.

The Government submits that *In re Bradley* should not be deemed by this Court to be decisive in this particular case. *In re Bradley*, and the cases cited therein, were decided prior to the promulgation of Rule 17(g) with the other Federal Rules of Criminal Procedure on March 21, 1946. Further, Rule 17(g) covers only part of the subject matter of Section 401 of Title 18 (specifically subsection 3), the Section under which *Bradley* was decided. It would thus appear that the District Court was not precluded from sentencing appellants pursuant to its powers under Rule 17(g) alone, which may be viewed as super-

seding the *Bradley* case and, in part, Section 401(3). See 2 ORFIELD, Criminal Procedure under the Federal Rules, § 17:119. It may be seen from the record that Judge Judd never stated that he was sentencing appellants pursuant to Section 401; only Rule 17(g) was invoked. Further, this Court has not had an opportunity to comment on the *Bradley* case in the context of the facts of the instant case. But see, *United States v. De Simone, supra*, at 746 (*dicta*).

We believe that in the instant case Judge Judd clearly chose to rely on imprisonment (terms of 40 days and 90 days) rather than on fines (\$750 and \$1000) to punish appellants and to provide for a deterrent to future violations of process of the District Court. To follow *Bradley* in this case would be to allow appellants to escape, through the mechanical application of the *Bradley* rule, any strong punishment. Further, the fines that were imposed may be seen as having been designed to reimburse the expenses of the Government and Court in enforcing the subpoenas and conducting the hearing. See *N.L.R.B. v. Local 825*, 430 F.2d 1225, 1229 (3d Cir. 1970), *cert. denied*, 401 U.S. 976 (1971); *Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966); *Doubleday v. Sherman*, 7 Fed. Cas. No. 4,020 (C.C.N.Y. 1870); *United States v. Greyhound Corp.*, 370 F. Supp. 881, 886 (N.D. Ill.), *aff'd*, 508 F.2d 529 (1974). The Government would suggest that remand of this matter to the District Court would be in order should this Court require additional information on the rationale under which the district Judge sentenced appellants.

CONCLUSION

The convictions for contempt should be affirmed.

Respectfully submitted,

Dated: December 29, 1975

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on
day of December, 1975, I deposited in Mail Chute Drop for
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of
State of New York, a Brief for the Appellee
of which the annexed is a true copy, contained in a securely enclosed po
directed to the person hereinafter named, at the place and address state
Herbert J. Kaplan, Esq. Zerin, Cooper & Hor
Statler Hilton Hotel 26 Court Street
New York, N.Y. 10001 Brooklyn, N.Y. 1124

Sworn to before me this
31st day of Dec. 1975

Martha Scharf

Evelyn Cohen

MARTHA SCHARF
Notary Public, State of New York
No. 104218
Commission Expires March 30, 1977

the 31st---

mailing in the

Kings, City and

postpaid wrapper

ed below:

lick, Esq.

2

Ken

